

**PUBLIC INTEGRITY COMMISSION
MINUTES
July 17, 2018
10:00 A.M.**

1. Call to Order: 10:20 a.m. Present: Bonnie Smith (Chair); Michele Whetzel (Vice-Chair); Commissioners: Andrew Gonser, Esq.; Andrew Manus; Kyle Evans Gay, Esq. Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for May 15, 2018: Moved—Commissioner Gonser; seconded—Commissioner Whetzel. Vote--5-0, approved.

3. Administrative Items

A. Commission Counsel contacted the Office of Pensions to ask them to change the wording on their website regarding the “Return to Work” rules. State employees are often confused about the 6 month ‘cooling off’ period imposed by the Pension office and the 2 year post-employment restriction in the Code of Conduct. The agreed change is now on their website.

B. Trainings:

1. City of Dover: Employees; council; appointed officials—307 attendees.
2. Delaware League of Local Governments—33 attendees.
3. YTD training #--462 attendees. CY2017—166 attendees.
4. State OMB—July 19, 2018

C. Budget: No cuts but balances increased by \$10K due to accumulation of lobbyist’s late fees.

D. Legislation:

1. HB 92—Would have required public officers to disclose monies received from government entities for land development rights, agricultural easements, forest easements. Passed the House, released from Senate committee, laid on table on the Senate floor.
2. HB 73—Intended to enhance PIC’s ability to collect information to monitor public officers who receive dual compensation. Not brought to the House floor for a vote.

4. Motion to go into Executive Session to Hear Requests for Advisory Opinions, Waivers and Complaints: Moved--Commissioner Gay; seconded—Commissioner Gonser. Vote--5-0, approved.

5. 18-23-- Private Interest

Employee worked for [a government entity in the] Planning Department (“Department”). The Department was responsible for regulating land use, building permits, code enforcement, mapping/geographic information systems and community development within the [government’s] jurisdiction.

[Employee] and his wife were in the process of purchasing a farm located within the [government]’s jurisdiction. The property had been listed for sale for almost two years. They intended to divide the farm into individual lots through the subdivision administrative review process, which was administered by his Department. The process was set forth in the [government’s ordinances] and consisted of an administrative review in which a member of the Planning Department would review the plans to determine the appropriate code, and also verified that all of the required “checklist” items had been submitted prior to approval and recordation of the plan. The process would not afford the reviewing party the opportunity to offer an opinion on the matter or to use their personal discretion. Once the plan was recorded the farm would be officially divided into separate lots.

The land use process was available to any land owner whose property met the subdivision criteria. As long as the code’s requirements were followed, the plans were approved and recorded. There was no situation in which a plan that met the code’s criteria could be denied and the process did not require any public hearings or notifications. Employee would not have any involvement in the review process and the reviewing staff member would report to the Director of the Department (Employee’s supervisor). Employee hired consultants to do the engineering and surveying work and submit the finalized plans to the [government].

Employee asked the Commission whether his plan to subdivide his private property would create a conflict of interest with his official job duties.

A. Personal Jurisdiction

The State code applies to all counties and municipalities that have not adopted their own Code of Ethics.

It is the desire of the General Assembly that all counties, municipalities and towns adopt Code of Conduct legislation at least as stringent as this act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. Subchapter I, Chapter 58, of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which have not enacted such legislation by January 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any [governmental entity], municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29.”

29 *Del. C.* § 5802(4).

Employee fell within the jurisdiction of the State Code of Conduct.

B. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 *Del. C.* § 5805(a)(1).

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

[Employee’s] ownership of the farmland constituted a private interest. Having established the existence of a private interest, the Commission considered whether that interest conflicted with [Employee’s] official job duties. Obviously, as [an employee of the] Planning Department, it would be a conflict of interest for [Employee] to review and dispose of matters related to his subdivision request. However, [Employee] stated that subdivision requests were so routine that no one outside of the desk staff were required to review them. In the unlikely event the reviewing personnel required managerial input on [Employee’s] request, he had worked out a recusal strategy whereby the staff member would report directly to [Employee’s] supervisor. Obviously, [Employee’s] supervisor would be able to review the matter without fear of reprisal or retaliation. That did not mean the Commission believed [Employee] would seek reprisal or retaliation, he was, and is, entitled to a “strong legal presumption of honesty and integrity.” *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *affd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).

C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

Requests to subdivide properties that complied with the requirements of the code were routinely approved. Because the review process required very little personal judgment, it was unlikely that [Employee’s] application to subdivide his land would raise suspicion amongst the public that he was acting contrary to the public trust. In addition, the staff member reviewing [Employee’s] application would report directly to [Employee’s] supervisor, thus diminishing the public perception that [the supervisor’s] judgment was influenced by the prospect of reprisal or retaliation.

Motion: [Employee’s] proposed subdivision of the property in the manner he described did not create a conflict of interest with his [government] job duties. Moved—Commissioner Whetzel; seconded—Commissioner Gay. Vote 5-0, approved.

6. 18-26—Post Employment

Applicant did not appear at any time during the two hour meeting.

7. 18-25—Complaint—Using Official Position for Personal Benefit

I. Procedure

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). [Complainant]'s submission was not notarized. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). While the Commission could have dismissed the Complaint for failure to be properly notarized, it was likely [Complainant] would simply have the Complaint notarized in the proper format and re-submit it at a later date. As a consequence, the Commission decided to examine the Complaint further to determine if the Commission had jurisdiction over the subject of the Complaint. [Subject is a volunteer for an organization located in a particular City].

II. Jurisdiction: The Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. *See, e.g.,* 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

The Commission examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim should be dismissed. 29 *Del. C.* § 5809(3). The remaining allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

Personal Jurisdiction

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 *Del. C.* § 5802(4).

City employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the City has adopted a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 *Del. C.* §5802(4). [The City] had not adopted its own Code of Conduct. Consequently, its employees and elected officials were subject to the State Code of Conduct.

[Complainant] alleged that [Subject] was using his [volunteer] position for financial gain. Specifically, [Complainant] stated that when the [organization] was [active in the community,

Subject would use the organization's credentials for his personal financial benefit]. If [Subject] were an employee or appointed official of [the City], he would be violating 29 Del. C. § 5806(3). ("No [city] employee, [city] officer or honorary [city] official shall use such public office to secure unwarranted privileges, private advancement or gain."). However, [Subject] did not appear to be either an employee or an appointed official of the City while serving [as a volunteer].

The City's charter contained only one provision referencing the City's power to establish and/or organize an [organization that would provide the same services as the volunteer organization]. It read in its entirety: *[omitted to protect the identity of 'Subject']*

While the City had power [to create a similar organization], it also had the option to donate monies to an [organization that would provide the same services]. It appeared that in lieu of creating [their own organization], the City had opted to donate monies to the [volunteer organization]. The City's website did not include [the organization] in its list of government departments but did include other departments. Furthermore, the [organization received some of its funding by way of contributions, rather than through the City's budget process].

The [City]'s separation from the [organization] was markedly different than the connection between [other cities with similar organizations that were funded through the annual budgeting process].

Given the facts that the [organization] was not a "department" within the [City] and it did not receive monies from the [City] through the annual budgeting process, the Commission decided that [Subject] was not an employee or official of the [City] when acting [on behalf of the organization]. As a consequence, the Commission did not have personal jurisdiction over [Subject] and he did not fall under the State Code of Conduct. As a result, the Complaint was dismissed.

Moved—Commissioner Gonser; seconded—Commissioner Gay. Vote 5-0, approved.

8. 18-12(b)—Supplement Complaint

At the May 15th meeting, the Commission dismissed the original Complaint ("A") against [Official]. Before the formal letter opinion was issued on June 8, 2018, Complainant submitted a supplement to his Complaint ("B"), which was received by PIC on May 25th. Attached to the supplemental filing (marked by Complainant as Exhibit H) were minutes from [a meeting] showing that [Official] had been aware of, and voted on, matters related to [a community project] in 2017, despite the fact that he had previously stated he only voted on matters related to the [project] after January 2018.

Procedure

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 Del. C. § 5810(a). The supplement to the original Complaint was notarized in the appropriate format. (29 Del. C. § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd* *PIC v. Hanson*, 69 A.3d 370 (Del. 2013))). However, given the fact that the original Complaint had already been dismissed, it was unclear whether the supplement itself would qualify as a properly sworn Complaint. However, the Commission did not need to resolve that issue based on the analysis below.

Commission's Previous Decision--A

Originally, Complainant alleged that in December 2017, and January 2018, [official] improperly voted in favor of a [community project]. The [community project] was [sponsored by a non-profit entity with a 14 member Board of Directors]. [One member of the Board donated significant assets to the community project]. [In exchange the government] agreed to loan the [non-profit entity monies towards the community project] as part of a public-private partnership. Complainant alleged that [Official]'s votes on the project were improper because [a family member], worked [at a business owned by two members of the Board] at the time of the vote. According to Complainant, [Official]'s failure to recuse himself from the matter was a violation of 29 *Del. C.* 5805(a)(1) (officials may not review or dispose of matters if they, or a close relative, have a personal or private interest that may tend to impair judgment in the performance of official duties).

The Commission, assuming that [the family member] was employed [at the business] during the time [Official] voted on matters related to the [community project], decided the relationship between [official] and [the family member's] employment at a company owned by two members of a of a 14 member Board of Directors, was too attenuated to support the inference of a conflict of interest. As a consequence, the Commission dismissed Complainant's allegations related to 29 *Del. C.* § 5805(1).

Commission's Consideration of the Supplement to the Original Complaint--B

Complainant's supplemental submission (B) did nothing to change the facts the Commission previously considered. The Commission assumed that [the family member] was employed [at the business] during the time [Official] cast his vote(s) and decided that their employment did not create a conflict of interest which would have required [Official]'s recusal. As the matter had already been decided, the Commission also dismissed the supplement (B) to the original Complaint (A).

Moved:--Commissioner Manus; seconded Commissioner Whetzel. Vote 5-0, approved.

9. 18-16—Complaint—Personal or Private Interest

I. Procedure

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 *Del. C.* § 5810(a). On March 8, 2018, Complainant attested to a sworn Complaint against [a government official]. PIC received the Complaint on March 27, 2018. The Complaint appeared to be notarized in the appropriate format. (29 *Del. C.* § 4328(3)). (*Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)).

After deciding the Complaint was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim should be dismissed. 29 *Del. C.* § 5809(3). The remaining allegations were then examined to determine if a majority of the Commission had reasonable

grounds to believe a violation could have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

II. Jurisdiction

The Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

A. Personal Jurisdiction

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 Del. C. § 5802(4).

Government employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the [governmental entity] has adopted a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 Del. C. §5802(4). [Official] had been [part of the government entity] since 2016. Prior to [his current position], he served on [one of the entity's committees]. He was subject to the State Code of Conduct because the [government entity] had not adopted its own Code of Conduct.

B. Subject Matter Jurisdiction

The Commission could only address alleged violations of "this chapter"-Title 29, ch. 58. 29 Del. C. § 5810(h). The Complaint alleged [Official] voted on matters in which he had a conflict of interest and created an appearance of impropriety but did not reference a specific statute. The conflict of interest provision is 29 Del. C. § 5805(a)(1) & (2). The appearance of impropriety statute is 29 Del. C. § 5806(a). The alleged conduct appeared to fall within those provisions of the Commission's statutory jurisdiction.

III. Facts

A. [The 'Matter']

Complainant alleged that [Official] voted on [a matter] while he [was on the committee] and again [in his current position]. [The matter] involved a request by [a local business] to re-zone a parcel of land. According to the Complaint, the [committee considered the matter twice in] 2017. It was alleged that during those two meetings [Official] voted on the disposition of [the matter]. However, according to the copies of the minutes submitted by the Complainant, [Official] was not present at either of those meetings. Furthermore, the [Official left the committee to accept a different position] in 2016. As a result, it would have been impossible for him to vote as a member of the [committee].

In 2017, [the matter] was brought before the [government entity]. On both occasions

[Official] voted to defer action on [the matter]. Finally, in early 2018, it was alleged that [Official] voted on three more motions related to [the matter].

B. [Community project]

Next, Complainant alleged that [Official] improperly voted in favor of a loan to [non-profit entity in support of a community project]. The [non-profit entity] asked [the government entity] for a loan [to support the project] as part of a public-private partnership.

According to the Complaint, [Official]'s vote on the project was improper because [a family member] worked for a [business owned by two members of the private entity's Board of Directors]. Complainant further alleged that the terms of the loan for the [community project] were so favorable that [Official]'s vote(s) must have been influenced by his [family member's] employment. Based on the foregoing, Complainant believed that [Official] should have recused himself from the [community project] vote.

IV. Application of the Law

A. 29 Del. C. § 5805(a)(1): [government] officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties.

The Complaint alleged that [the Official] improperly voted on [a matter]. Two of the votes took place during the time period [Official's family member] was employed by [the business requesting the zoning change]. However, [Official] voted to defer action on the matter. Defer is defined as "delay; put off; postpone to a future time." (*Black's Law Dictionary*, p. 421 (5th ed. 1979)). In essence, his vote was a vote to *not* decide. The reason for the delay was to allow the [government] more time to investigate whether the zoning change would require additional traffic lights on the roadways surrounding the property. While it would have been more appropriate for [Official] to recuse himself from the matter, the Commission decided it was unlikely that his vote to postpone the decision-making process was the result of an improper influence on his official judgment. To the contrary, [Official] could have voted to move forward with the project and avoid further delays. By the time the [matter] was brought up for a final vote in 2018, [the family member] was no longer working [at the business], thus removing the conflict of interest.

Next, the Complainant alleged that [Official] had a personal interest in the [community project]'s success because his [family member] previously worked for [a member of the non-profit's Board of Directors]. When evaluating these provisions of the Code of Conduct, the Commission has previously emphasized the fact that a course of conduct need not actually result in a violation, only that it "may result" in a violation. *Commission Op. Nos. 92-11; 99-34*. As to the existence of a conflict of interest, Delaware Courts have held that for the interest to be sufficient [to constitute a conflict of interest] the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, Graves, J. (November 21, 1995).

The agreement between the [non-profit entity] and the [government entity] has been described as a public-private partnership. Public-private partnerships are increasingly being used to leverage capital improvements. *Public Private Partnerships: Issues and Considerations*, *Practical Law Practice Note*, pg. 1. The partnership was predicated on the fact

that both the public entity and the private entity share in the risks and rewards of the joint endeavor.

Governments often do not want (or cannot afford) to assume full financial and operational responsibility for their infrastructure projects. These projects are capital intensive and governments may not have the resources, personnel and expertise necessary to develop and manage these projects....As a result, governments are increasingly using P3s as procurement method to develop their infrastructure.

Id., pg. 2

The use of the P3 model has become so prevalent that the Financial Accounting Standards Board (FASAB) issued a formal statement detailing the need for P3s and the unique financial reporting rules which are applied to those entities.

[F]ederal public-private partnerships (P3s) are risk-sharing arrangements or transactions with expected lives greater than five years between public and private sector entities. Such arrangements or transactions provide a service or an asset for government and/or general public use where in addition to the sharing of resources, each party shares in the risks and rewards of said arrangements or transactions. As federal entities face under-utilization and skill retention issues....some entities are entering to P3 arrangements/transactions to put both infrastructure and government personnel to heightened work.

FASAB Statement 49 (F.A.S.A.B.), 2016 WL 3209743 (June 30, 2017).

In sum, P3 agreements are used by a multitude of government entities to leverage capital investments, while reducing the risk associated with the project, much like the partnership between the [non-profit entity] and the [government entity].

The [non-profit board] was comprised of 14 members. Among the 14 members were [people with varied backgrounds]. Only two of the members, a minority, [owned a business where the family member was employed]. The [non-profit entity] donated [a significant asset] to the project, as well as [a significant amount of money] in initial funding before the [government entity] would be required to loan the [community project any money]. The [government entity] was protected from liability because they would not own the facility and because the [donated asset] was security for the loan.

The Delaware Superior Court has found that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, Graves, J. (November 21, 1995). The familial relationship in that case was one of husband and wife. *Id.* Furthermore, in situations where governments and private entities have created a public/private partnership, it is difficult to discern an official's bias when voting on the subject of the partnership because, by definition, a vote that is presumed to benefit the private entity, also benefits the government entity. Based on the foregoing facts, the Commission decided that the relationship between [Official] and his [family member's] employment was too attenuated to support the inference of a conflict of interest. As a result, the Commission dismissed the Complainant's allegations related to 29 Del. C. § 5805(1).

B. 29 Del. C. § 5805(2): A person has an interest which tends to impair the person's independence of judgment in the performance of their duties when:

- a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or**
- b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.**

As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b).

As stated above, [Official]’s votes on [the matter] were votes to defer the decision-making process. By the time an actual vote was taken in 2018, [the family member] was no longer employed at the business, thus removing the conflict of interest. As to the [community project] vote, the Commission decided that [the family member’s] employment with the [Board member’s business] was too attenuated from [Official]’s votes on the matter to create a conflict of interest. (See above). As a result, this allegation was dismissed.

C. 29 Del. C. § 5806(a): Each [government] employee, officer and honorary [government] official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government.

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The Commission has previously held that in deciding if there is an appearance of impropriety it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75* (citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567 (1967)). That holding is consistent with the Delaware Supreme Court decision which held: absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the “appearance of impropriety.” It noted that appearances of impropriety claims have been criticized as being too “imprecise, leading to ad hoc results.” *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991). Consistent with that opinion and other

case law, the Commission dismissed this allegation because it was supported by only an appearance of impropriety which was solely based on suspicion and innuendo.

Motion: The Complaint was dismissed in its entirety for failure to properly allege facts which would support the Commission's finding of a violation of the Code of Conduct. Moved—Commissioner Whetzel; seconded—Commissioner Gay. Vote 5-0, approved.

10. 18-14—Complaint Personal or Private Interest (*Commissioner Smith recusing*)

I. Procedure

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 *Del. C.* § 5810(a). On February 22, 2018, Complainant attested to a sworn Complaint against [a government official]. [Official had been a member of the government entity] since 2008. PIC received the Complaint on February 27, 2018. The Complaint appeared to be notarized in the appropriate format. (29 *Del. C.* § 4328(3)). (See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013))).

II. Jurisdiction: The Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

After reviewing the Complaint to determine if it was properly sworn, the Commission next examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage of the proceedings all facts are assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim were dismissed. 29 *Del. C.* § 5809(3). The remaining allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).¹

A. Personal Jurisdiction

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 *Del. C.* § 5802(4).

[Government] employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the [government entity] has adopted a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 *Del. C.* §5802(4). [Official] was a member

¹ Superior Court Rules are used because if a violation is found, the individual may appeal to that Court. 29 *Del. C.* § 5810(h)(2).

of the [governmental entity]. He was subject to the State Code of Conduct because the [government] had not adopted its own Code of Conduct.

B. Subject Matter Jurisdiction

The Commission can only address alleged violations of "this chapter"-Title 29, ch. 58. 29 Del. C. § 5810(h). The Complaint alleged that [Official] violated: 29 Del. C. §§ 5805(a)(1) & (2); 5806(a), (b) & (c). The alleged conduct appeared to fall within the Commission's statutory jurisdiction.

III. Facts

Generally, Complainant alleged that [Official] had a conflict of interest when he voted on the [government]'s budget in [numerous] fiscal years. Specifically, Complainant objected to [Official]'s votes because the annual budget contained disbursements to [volunteer organizations which had the potential to financially benefit the Official]. Complainant alleged that conflicts arose out of [Official]'s ownership of [a business] and his employment with [another business]. [Both of the businesses sold products to the same volunteer organizations that received the government disbursements]. Complainant alleged that [Official] voted to give funds to [the organizations] so that he could benefit financially through his private interests.

Exhibit A listed recipients of funds from 2012 to 2017. In addition to listing the recipient, the list also described the purpose for which the monies were to be used. The [volunteer organizations] were listed as recipients 22 times. Of those 22, 5 were for [products sold by the Official's business and employer]. They were: *[omitted to protect the individual's privacy]*.

Exhibit B listed the monies that were disbursed to the [volunteer organizations].

Complainant also attached various exhibits detailing equipment purchased by the [volunteer organizations] over the past decade. It would be impossible for the Commission to determine if there was a direct correlation between the funds granted to the [volunteer organizations] and the purchases of equipment from [the Official's business and employer] because [the volunteer organizations] also received monies from the State and through donations and fundraising efforts. However, the Commission considered whether [Official]'s ownership of [his business and/or his employment] created a conflict of interest with the performance of his official duties when voting on the [government's disbursements].

IV. Application of the Law

A. 29 Del. C. § 5805(a)(1): [government] officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties.

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996).

It was not clear how the [government's disbursement] process worked. However, the Commission decided it was likely that [Official] would [review the material] before he cast his vote. The minutes submitted as exhibits to the Complaint showed that [Official] voted "yea" for the [disbursements] but it was not clear if he had any say in how much each [organization] received or how much they received in total. The question considered was whether [Official]'s judgment would likely have been affected by his private interests.

Clearly as a person who owned his own company and worked for another company that sold [products to the organizations], [Official] would have an interest in the amount of monies each [organization] received [from the government]. That was especially true if [Official] had knowledge of which [organizations] were preparing to buy equipment prior to his vote on the [disbursements]. As such, the Commission determined this count was substantiated by the facts presented.

B. 29 Del. C. § 5806(a): Each [government] employee, officer and honorary [government] official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the government.

This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

[Official]'s conduct had raised suspicion among at least one member of the public, Complainant. The Commission weighed [Official]'s right as a citizen to own a business and to work as an employee of another business against the appearance of impropriety caused by his private interest's relationship to official decisions he made as a [government official]. Although [Official]'s private interests were important, the Commission decided that his duty to the [government's] citizens to abide by the State's Code of Conduct weighed more heavily. This was especially true given the fact that [Official] could have easily recused himself from voting for the [disbursements to the organizations]. As a consequence, the Commission determined that the facts set forth in this allegation supported the finding of a violation.

C. 29 Del. C. § 5806(b): No [government] employee, [government] officer or honorary [government] official shall have any interest in any private enterprise nor shall such employee, officer or honorary official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No [government] employee, [government] officer or honorary [government] official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:

(1) Impairment of independence of judgment in the exercise of official duties;

To avoid impaired judgment in performing official duties, [government] officials may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Official] was not voting on matters directly related to [his business and his employer]. Nonetheless, his votes on the [disbursements] may have had a derivative effect on his private interest's financial well-being. The Commission considered whether the derivative effect was of such significance that it would affect [Official]'s official judgment.

The amount of monies given to [the organizations] over the past decade was significant. In addition, the equipment [Official sold while working for his employer] was expensive, sometimes costing tens of thousands of dollars or even more. The Commission decided it was likely that [Official]'s judgment could be impaired by the knowledge that monies allocated could be spent on items that would benefit himself or his employer. As such, this allegation was substantiated.

(2) An undertaking to give preferential treatment to any person;

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. There were no facts to suggest that [Official] had given preferential treatment to his colleagues and co-workers and the allegation was dismissed.

(3) The making of a governmental decision outside official channels;

There were no facts to suggest that [Official] made official decisions outside official channels. This allegation was dismissed.

(4) Any adverse effect on the confidence of the public in the integrity of the government.

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the [governmental entity]'s duties could be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

The Commission decided that [Official]'s dual interests created a justifiable impression of a violation. The close relationship between his official actions, the recipients of those actions and his private interests were likely to create an appearance of impropriety amongst the public. Consequently, the Commission substantiated this allegation.

D. 29 Del. C. § 5806(c): No [government] official shall acquire a financial interest in any private enterprise which such official has reason to believe may be directly involved in decisions to be made by such official in an official capacity on behalf of the [governmental entity].

This provision was inapplicable to [Official]'s situation. He had owned [his business] for many years and had also worked [for his employer] for a long period of time. There were no facts to suggest that he acquired his private interests knowing that he would be voting on matters that would benefit them financially. The allegation was dismissed.

Motion: A majority of the Commission found that there was reason to believe that violations of the Code of Conduct had occurred. The matter should be scheduled for a formal hearing. Moved—Commissioner Gonser; seconded—Commissioner Manus. Vote 4-0, approved.

11. Motion to go out of Executive Session: Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, approved. (Commissioner Smith not present).

12. Adjournment